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ARA Nevada LLC

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEVADA

In re:	Case No. BK-S-13-19693-LED
ARA NEVADA LLC,	Chapter 11
Debtor.	

**CERTIFICATE OF SERVICE OF SUPPLEMENTAL BRIEF IN SUPPORT OF  
DEBTOR'S OPPOSITION TO MOTION TO COMPEL ASSUMPTION OR REJECTION  
OF LICENSE AGREEMENT AS AN EXECTORY CONTRACT UNDER 11 U.S.C.  
§365(D)(2) AND SUPPLEMENTAL DECLARATION OF CHRISTOPHER BENTLEY IN  
SUPPORT OF SUPPLEMENTAL BRIEF IN SUPPORT OF DEBTOR'S OPPOSITION  
TO MOTION TO COMPEL ASSUMPTION OR REJECTION OF LICENSE  
AGREEMENT AS AN EXECTORY CONTRACT UNDER 11 U.S.C. §365(D)(2)**

On April 7, 2014, I served the SUPPLEMENTAL BRIEF IN SUPPORT OF DEBTOR'S  
OPPOSITION TO MOTION TO COMPEL ASSUMPTION OR REJECTION OF  
LICENSE AGREEMENT AS AN EXECTORY CONTRACT UNDER 11 U.S.C.  
§365(D)(2) AND SUPPLEMENTAL DECLARATION OF CHRISTOPHER BENTLEY IN  
SUPPORT OF SUPPLEMENTAL BRIEF IN SUPPORT OF DEBTOR'S OPPOSITION  
TO MOTION TO COMPEL ASSUMPTION OR REJECTION OF LICENSE  
AGREEMENT AS AN EXECTORY CONTRACT UNDER 11 U.S.C. §365(D)(2).

1. I served the above-named document by the following means to the persons listed below:
- ☒ a. ECF System. See Notice of Electronic Filing attached hereto.
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I declare under penalty of perjury that the foregoing is true and correct.

Signed on: April 8, 2014

Jerri Hunsaker  
Name

Jerri Hunsaker  
Signature

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0978-2  
Case 13-19693-led  
District of Nevada  
Las Vegas  
Tue Apr 8 08:34:27 PDT 2014  
United States Bankruptcy Court  
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From: USBC\_NEVADA@nvb.uscourts.gov  
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U.S. Bankruptcy Court

District of Nevada

Notice of Electronic Filing

The following transaction was received from YANXIONG LI entered on 4/7/2014 at 10:10 PM PDT and filed on 4/7/2014

Case Name: ARA NEVADA LLC

Case Number: 13-19693-led

Document Number: 46

Docket Text:

Supplemental Opposition *BRIEF IN SUPPORT OF OPPOSITION TO MOTION TO COMPEL ASSUMPTION OR REJECTION OF LICENSE AGREEMENT AS AN EXECUTORY CONTRACT UNDER 11 U.S.C. Â§ 365(d)(2)* Filed by YANXIONG LI on behalf of ARA NEVADA LLC (Related document(s)[36] Brief filed by Debtor ARA NEVADA LLC.) (LI, YANXIONG)

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: Supp Brf ISO Opp to Mo to Compel - FINAL 4.7.14.pdf

Electronic document Stamp:

[STAMP bkecfStamp\_ID=989277954 [Date=4/7/2014] [FileNumber=26199743-0]  
[412d559bb6226589b9cc761f43fab3f1bed20bf6a01654aec6d55af4f4848975fb55  
21d05671c9f46177c10e6cb002cf4350910d0a716440622a2130b40d1003]]

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From: USBC\_NEVADA@nvb.uscourts.gov  
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U.S. Bankruptcy Court

District of Nevada

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Case Number: 13-19693-led

Document Number: 47

**Docket Text:**

Supplemental Declaration Of: Christopher Bentley *IN SUPPORT OF SUPPLEMENTAL BRIEF IN SUPPORT OF DEBTORS OPPOSITION TO MOTION TO COMPEL ASSUMPTION OR REJECTION OF LICENSE AGREEMENT AS AN EXECUTORY CONTRACT UNDER 11 U.S.C. Â§ 365(d)(2)* Filed by YANXIONG LI on behalf of ARA NEVADA LLC (Related document(s)[46] Opposition filed by Debtor ARA NEVADA LLC) (LI, YANXIONG)

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**Declaration of CB ISO Supp Brief ISO OPP to MOT to Compel - FINAL.pdf

**Electronic document Stamp:**

[STAMP bkecfStamp\_ID=989277954 [Date=4/7/2014] [FileNumber=26199749-0]  
[99f0e9ad3a4ce52dd4b67413cd462f06aa8a2171c137d80724593d495b6c7235a3f1  
9e750f2d16cdf49ef880122d318e7e490e488321295fe8f1d2cb38480c96]]

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ARA Nevada LLC

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In Re:

ARA Nevada, LLC, a Nevada limited liability  
company,

Debtor.

Case No.: 13-19693-led  
Chapter 11

Hearing Date: April 8, 2014  
Hearing Time: 10:30 AM

**SUPPLEMENTAL BRIEF IN SUPPORT OF  
DEBTOR'S OPPOSITION TO MOTION TO COMPEL  
ASSUMPTION OR REJECTION OF LICENSE AGREEMENT  
AS AN EXECUTORY CONTRACT UNDER 11 U.S.C. § 365(d)(2)**

Debtor/Debtor-in-Possession, ARA NEVADA, LLC, through its attorneys, the law firm of Black & LoBello hereby files its Supplemental Brief In Support Of Opposition To Motion To Compel Assumption Or Rejection Of License Agreement As An Executory Contract Under 11 U.S.C. § 365(d)(2) ("Supplemental Brief").

This Supplemental Brief is made based upon the following Memorandum of Points and Authorities, the pleadings and papers on file, and any arguments the court chooses to entertain at the time of the above-captioned hearing on this matter.

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///

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS AND PROCEDURAL HISTORY<sup>1</sup>

A. BACKGROUND ARA-NEVADA LLC

1. Over several years, ARA Nevada, LLC ("Debtor" and collectively with its predecessor, the "Company") has established a strong reputation through providing performance-based real estate brokerage services to communities throughout Nevada.

2. Founded on the entrepreneurial spirit and hard work of Christopher and Jodi Bentley, the Company has established an excellent reputation as one of the premier real estate firms in Nevada.

3. Since its inception, the Company has developed a particular focus on the multi-family market. By 2008, after extensive branding efforts and various achievement awards, the Company rapidly expanded from 3 to 15 team members with complete suite of services to meet the demands of an increasing diverse portfolio of clientele, including leased investments, hospitality, industrial and land.

4. In short, the Company enjoyed significant success, with increasing market share year-over-year culminating in approximately \$250,358,000 in sales volume for 2007.

B. THE LICENSE AGREEMENT

5. On July 1, 2010, Apartment Realty Advisors, Inc. ("ARA National") arranged for the Company to obtain a license to use certain intellectual property as part of ARA National's expanding network of promotional and support system for facilitation of real estate transaction ("License Agreement").

6. Under the License Agreement, the Company agreed to tender a one-time initiation fee of \$50,000 and annual license fee ("License Fee") of \$35,125 for the first year of the agreement. However, ARA National retained unilateral right to increase the License Fee after the first year unconstrained by any conditions or restrictions under the License Agreement.

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<sup>1</sup> Unless otherwise specified, all facts and procedural history contained in Debtor's Opposition To Motion To Compel Assumption Or Rejection Of License Agreement As An Executory Contract Under 11 U.S.C. § 365(d)(2) are incorporated in this Supplemental Brief by reference.

1           7. On information and belief, the Company obtained membership interest in ARA  
2 National by entering into the Licensing Agreement. Pursuant to the Close Corporation  
3 Agreement, the Company may not be divested of its membership interest absent a vote to oust  
4 the Company comprising of eighty (80%) percent of the remaining membership interest in ARA  
5 National.

6           8. Additionally, by its membership interest in ARA National, the Company is  
7 entitled to a *pro rata* share of the sale proceeds proportional to its interest should ARA National  
8 become the subject of a merger or acquisition transaction.

9           9. On August 1, 2011, ARA National, the Company, and Debtor executed an  
10 assignment and assumption agreement ("Assignment") under which the Debtor received all  
11 rights, claims and interests under the License Agreement. In essence, ARA National agreed to  
12 allow the Debtor to assume the position of the Company under the License Agreement, subject to  
13 all terms and conditions inuring to the benefit of the respective parties thereunder.

14           10. As part of the initial draw for entering into the License Agreement, ARA National  
15 represented that prospective increase in membership interest will lead to significant decrease in  
16 License Fees charged to each cost-sharing member-entity, such as the Debtor. Nonetheless, the  
17 exact opposite came to fruition – i.e. No new members were added and membership fees  
18 increased drastically since 2010.

19           **C. DEBTOR'S FINANCIAL DIFFICULTY**

20           11. Since the real estate market began to decline and the credit market dramatically  
21 tightened, the real estate market in Nevada has been extremely slow in recovery.

22           12. As a result of the deteriorated economic situation, and rapidly increasing License  
23 Fees, the Debtor, was unable to obtain the financing required to both continue its business  
24 operations and service the License Agreement.

25           13. The Debtor, through its managing members, began engaging its various lenders  
26 and ARA National to discuss potential resolutions of its financial shortfalls.

1           14. The parties discussed various workout agreements under which Debtor would  
2 continue to participate in the ARA National network in exchange for a fee adjusted based, in part  
3 or in whole, upon the Debtor's actual revenue.

4           15. As a result, a workout proposal was drafted under which ARA National agreed to  
5 forbear from taking any adverse actions against Debtor with respect to License Fee arrears, in  
6 exchange for an installment payment plan to make up for the arrears ("Forbearance Agreement").

7           16. On or about January of 2012, Debtor and ARA National entered into the  
8 Forbearance Agreement.

9           17. Since the parties entered into the Forbearance Agreement, the real estate and  
10 credit markets have not improved and, in fact, have become more difficult.

11           **D. ARA NATIONAL'S BREACHES THE FORBEARANCE AGREEMENT**

12           18. Since the parties entered into the Forbearance Agreement, ARA National has  
13 engaged in various conduct in direct contravention of the terms and spirit of the various  
14 agreements between the parties.

15           19. To illustrate, in or about October 2013, certain voting principals of ARA National  
16 convened to discuss and vote the termination of Debtor's licensee rights and interests. Debtor  
17 neither received notice nor any opportunity to represent its position as a member entity of ARA  
18 National, except being informed that the termination would be subject to Debtor's acceptance of  
19 more onerous terms not included in the License Agreement.

20           20. Thereafter, ARA National acted upon its intent to terminate the Debtor's licensee  
21 rights by shutting off the Debtor's email system and database access. Debtor regained access  
22 only after confronting various individuals ARA National regarding the impropriety of such  
23 conduct.

24           21. Based on this history of violations and potential transactions<sup>2</sup> related to a proper  
25 valuation of the License Agreement, adequate cause exists for the Court to allow Debtor the full  
26 statutory period to determine the propriety of assuming or rejecting the License Agreement.

27  
28           <sup>2</sup> Upon information and belief, Debtor has learned of recent negotiations regarding potential acquisition of  
ARA National by Newmark Grubb Knight Frank ("NGKF"), an international commercial real estate

## II. LEGAL ARGUMENT

Under § 365(d)(2), unless the bankruptcy court specifies a shorter time period, a chapter 11 debtor in possession “has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract”. 11 U.S.C. § 365(d)(2); N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 529, 104 S. Ct. 1188, 1198, 79 L. Ed. 2d 482 (1984). This temporal flexibility granted to Chapter 11 Debtors comports with the Code’s overall effort to provide some flexibility and breathing space. See Theatre Holding Corp. v. Mauro, 681 F.2d 102, 105 (2nd Cir. 1982) (Congress considered and rejected proposed time limits under Section 365(d)(2)...permitting trustee or debtor in reorganization a reasonable time to decide whether to assume or reject); DJS Properties, L.P. v. Simplot, 397 B.R. 493, 498 (D. Idaho 2008) ([in fact] Sections 365(d)(2) and 1123(b)(2) arguably allows the bankruptcy court to approve a plan that provides for post-confirmation assumption or rejection of an executory contract). Cf. In re Sw. Aircraft Servs., Inc., 831 F.2d 848, 850 (9th Cir. 1987) (recounting legislative history evidencing intent to avoid the dilemma of extended vacancies faced by mall operators through the adoption of “Shopping Center Amendments” imposing fix time limit for assumption or rejection of such leases). A key consideration in determining what constitutes a reasonable time to assume or reject an executory contract or unexpired lease under Section 365(d)(2) is whether the debtor has had sufficient time to appraise its financial situation and the potential value of its assets in formulating a plan. In re Rebel Rents, Inc., 291 B.R. 520, 530 (Bankr. C.D. Cal. 2003) (citing Theatre Holding Corp., 681 F.2d at 105) (the “Mauro” factors).<sup>3</sup> Moreover, “the complexity of the case, the number of leases

service firm. Debtor’s valuation of the License Agreement will undoubtedly require further discovery and assessment of the terms surrounding this potential acquisition.

<sup>3</sup> Although the focus of this Supplemental Brief centers on the litany of legal and factual issues surrounding the License Agreement, other “Mauro” factors going towards “reasonable time” for assuming or rejecting the License Agreement under Section 365(d)(2) also favor the Debtor. Critically, the License Agreement is essential to Debtor’s business and reorganization because of the substantial goodwill generated by use of the ARA trademark and trade name over the years. Additionally, the exclusivity period does not expire until mid-May in the Debtor’s case, and Debtor is not prohibited from seeking an extension of that period, if necessary, to resolve outstanding issues related to the value of the License Agreement. While ARA National has admittedly not received payment of License Fees since the Petition Date in this case, it will not suffer damages beyond compensation available under the Code given its ability to seek adequate protection. Consequently, these remaining factors, as more fully explained in Debtor’s original Opposition, all favor denial of ARA National’s present motion.

1 that the debtor must evaluate, and the need for a judicial determination of whether a lease exists”  
2 are also relevant considerations in determining whether to compel assumption or rejection. In re  
3 Enron Corp., 279 B.R. 695, 703 (Bankr. S.D.N.Y. 2002) (citing In re Burger Boys, Inc., 94 F.3d  
4 755, 760 (2nd Cir. 1996)). Where compelling a decision will result in significant harm to the  
5 Debtors and their creditors that outweighs the harm caused by the delay and the cost of litigating  
6 confirmation and § 365 issues, the Court should deny the motion to compel. See In re  
7 Hernandez, 287 B.R. 795, 806-07 (Bankr. D. Ariz. 2002).

8 Foremost, ARA National’s Motion to Compel should be dismissed based on issues related  
9 to modifications and/or amendments to the payment terms contained in the License Agreement.  
10 Critically, various communications were exchanged following the parties’ execution of the  
11 License Agreement regarding payment arrangements not specifically included in the License  
12 Agreement. Unless and until more clarity is obtained with respect to these terms, Debtor cannot  
13 intelligently reach a conclusion regarding the net value of the License Agreement *vis-à-vis* its  
14 prospective reorganization plan.

15 In addition to uncertainty regarding existing and prospective payment terms under the  
16 License Agreement, ARA National’s past attempts to terminate the Debtor’s membership interest  
17 raises issues regarding potential claims and offset that Debtor may assert the present case. As  
18 mentioned, throughout the history of performance under the License Agreement, ARA National  
19 has materially disrupted the Debtor’s ability to perform its obligation under the agreement and  
20 deprived Debtor of its bargained-for benefits under the same. Particularly flagrant were ARA  
21 National’s attempts to force termination of the License Agreement upon the Debtor, and actual  
22 termination of Debtor’s access to ARA National’s network and database services. This lack of  
23 access adversely affected Debtor’s capacity to operate and arguably constitutes a breach of ARA  
24 National’s obligations under the License Agreement. Given this history of past performances, an  
25 adequate evaluation of the value of the License Agreement necessarily entails considerations of  
26 potential claims for recovery by the Debtor for the benefit of the estate, as well as assessment of  
27 the parties’ ability to honor the contractual obligation thereunder going forward.

28 Any prospective sale of ARA National generates additional uncertainty regarding the

1 value of the License Agreement on various levels. This uncertainty, at the outset, involves  
2 potential changes to the character of the Debtor's membership interest in ARA National, and  
3 thereby cost-sharing obligations owed to the parent entity. Moreover, to the extent there are no  
4 geographical limitations restricting future applicants for licenses, the prospect for competing  
5 licensees directly impacts Debtor's ability to generate revenue in support of its reorganization  
6 efforts. Without a more concrete grasp of the facts and circumstances surrounding this potential  
7 sale of ARA National, there are too many speculative factors affecting the value of the License  
8 Agreement that counsel against compelling a premature decision to assume or reject the  
9 agreement at present. Therefore, this Court should deny ARA National's present motion to  
10 compel.

### 11 **III. CONCLUSION**

12 For the foregoing reasons, Debtor respectfully requests that the statutory deadline under  
13 11 U.S.C. 365(d)(2) be applied to allow the Debtor up to and including the date of confirmation  
14 to assume or reject the License Agreement.

15 DATED this 7th day of April, 2014.

16 **BLACK & LOBELLO**

17 By: /s/YanXiong Li, Esq.

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**DISTRICT OF NEVADA**

In Re:

ARA Nevada, LLC, a Nevada limited liability  
company,

Debtor.

Case No.: 13-19693-led  
Chapter 11

Hearing Date: April 8, 2014  
Hearing Time: 10:30 AM

**SUPPLEMENTAL DECLARATION OF CHRISTOPHER BENTLEY IN SUPPORT OF  
SUPPLEMENTAL BRIEF IN SUPPORT OF  
DEBTOR'S OPPOSITION TO MOTION TO COMPEL  
ASSUMPTION OR REJECTION OF LICENSE AGREEMENT  
AS AN EXECUTORY CONTRACT UNDER 11 U.S.C. § 365(d)(2)**

I, Christopher Bentley, declares as follows:

1. I am over the age of 18 years and am mentally competent. I have personal knowledge of the matters set forth in this Declaration and, if called upon to testify, could and would do so. I am a managing member of the above-captioned Debtor and Debtor-in-Possession ("Debtor").

2. I make this Declaration in support of the Debtor's Supplemental Brief in Support of Opposition to Motion to Compel Assumption or Rejection of License Agreement as an Executory Contract (the "Supplemental Brief"). I have reviewed the Supplemental Brief in its



entirety and can competently testify that all of the facts set forth in the Supplemental Brief are true and correct to the best of my knowledge.

3. Over several years, ARA Nevada, LLC ("Debtor" and collectively with its predecessor, the "Company") has established a strong reputation through providing performance-based real estate brokerage services to communities throughout Nevada.

4. Founded on the entrepreneurial spirit and hard work of Jodi Bentley and myself, the Company has established an excellent reputation as one of the premier real estate firms in Nevada.

5. Since its inception, the Company has developed a particular focus on the multi-family market. By 2008, after extensive branding efforts and various achievement awards, the Company rapidly expanded from 3 to 15 team members with complete suite of services to meet the demands of an increasing diverse portfolio of clientele, including leased investments, hospitality, industrial and land.

6. In short, the Company enjoyed significant success, with increasing market share year-over-year culminating in approximately \$250,358,000 in sales volume for 2007.

7. On July 1, 2010, Apartment Realty Advisors, Inc. ("ARA National") arranged for the Company to obtain a license to use certain intellectual property as part of ARA National's expanding network of promotional and support system for facilitation of real estate transaction ("License Agreement").

8. Under the License Agreement, the Company agreed to tender a one-time initiation fee of \$50,000 and annual license fee ("License Fee") of \$35,125 for the first year of the agreement. However, ARA National retained unilateral right to increase the License Fee after the first year unconstrained by any conditions or restrictions under the License Agreement.

9. On information and belief, the Company obtained membership interest in ARA National by entering into the Licensing Agreement. Pursuant to the Close Corporation Agreement, the Company may not be divested of its membership interest absent a vote to oust the Company comprising of eighty (80%) percent of the remaining membership interest in ARA National.

1           10. Additionally, by its membership interest in ARA National, the Company is  
2 entitled to a *pro rata* share of the sale proceeds proportional to its interest should ARA National  
3 become the subject of a merger or acquisition transaction.

4           11. On August 1, 2011, ARA National, the Company, and ARA Nevada, LLC  
5 executed an assignment and assumption agreement ("Assignment") under which the ARA  
6 Nevada, LLC received all rights, claims and interests under the License Agreement. In essence,  
7 ARA National agreed to allow the ARA Nevada, LLC to assume the position of the Company  
8 under the License Agreement, subject to all terms and conditions inuring to the benefit of the  
9 respective parties thereunder.

10           12. As part of the initial draw for entering into the License Agreement, ARA National  
11 represented that prospective increase in membership interest will lead to significant decrease in  
12 License Fees charged to each cost-sharing member-entity, such as the Debtor. Nonetheless, the  
13 exact opposite came to fruition – i.e. No new members were added and membership fees  
14 increased drastically since 2010.

15           13. Since the real estate market began to decline and the credit market dramatically  
16 tightened, the real estate market in Nevada has been extremely slow in recovery.

17           14. As a result of the deteriorated economic situation, and rapidly increasing License  
18 Fees, the Debtor, was unable to obtain the financing required to both continue its business  
19 operations and service the License Agreement.

20           15. The ARA Nevada, LLC began engaging its various lenders and ARA National to  
21 discuss potential resolutions of its financial shortfalls.

22           16. We engaged ARA National to discuss various workout agreements under which  
23 ARA Nevada, LLC would continue to participate in the ARA National network in exchange for a  
24 fee adjusted based, in part or in whole, upon the Debtor's actual revenue.

25           17. As a result, a workout proposal was drafted under which ARA National agreed to  
26 forbear from taking any adverse actions against ARA Nevada, LLC with respect to License Fee  
27 arrears, in exchange for an installment payment plan to make up for the arrears ("Forbearance  
28 Agreement").

1 18. On or about January of 2012, ARA Nevada, LLC and ARA National entered into  
2 the Forbearance Agreement.

3 19. Since the parties entered into the Forbearance Agreement, the real estate and  
4 credit markets have not improved and, in fact, have become more difficult.

5 20. Since the parties entered into the Forbearance Agreement, ARA National has  
6 engaged in various conduct in direct contravention of the terms and spirit of the various  
7 agreements between the parties.

8 21. To illustrate, in or about October 2013, certain voting principals of ARA National  
9 convened to discuss and vote on the termination of Debtor's licensee rights and interests. ARA  
10 Nevada, LLC neither received notice nor any opportunity to represent its position as a member  
11 entity of ARA National, except being informed that the termination would be subject to Debtor's  
12 acceptance of more onerous terms not included in the License Agreement.

13 22. Thereafter, ARA National acted upon its intent to terminate the Debtor's licensee  
14 rights by shutting off the Debtor's email system and database access. ARA Nevada, LLC  
15 regained access only after confronting various individuals ARA National regarding the  
16 impropriety of such conduct.

17 23. I declare under penalty of perjury that the foregoing is true and correct and that  
18 this declaration was executed on April 7, 2014, in Las Vegas, Nevada.

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21 /s/ Christopher Bentley  
22 Christopher Bentley  
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